U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 14Feb2001

CASE NO.: 2000-LHC-574

OWCP NO.: 7-34688

IN THE MATTER OF

ORIAS SCHLESINGER
Claimant

VS.

PENNZOIL
Employer

CNA INSURANCE COMPANIES

CIGNA INSURANCE COMPANY
Carriers

APPEARANCES:
Arthur J. Brewster, Esq.
For Claimant

V. William Farrington, Jr., Esq.
For Employer and Carrier (CNA)

R. Scott Jenkins, Esq.
For Carrier (CIGNA)

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et. seq.*, (The Act), brought by Orias Schlesinger (Claimant) against Pennzoil (Employer) and CNA Insurance Companies, and CIGNA Insurance Company (Carriers). The formal hearing was conducted at Metairie, Louisiana on October 11, 2000. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence Joint Exhibit 1, Claimant's Exhibits 1-5, CNA's Exhibits 1-6, and CIGNA's Exhibits 1-16.[2] This decision is based on the entire record.[3]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. Jurisdiction is not disputed;

2. The date of the injury/accident is disputed;

3. Claimant originally injured his knee on June 21, 1975 and underwent surgery. He was assigned a 5 % disability and returned to work without

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[1]The parties were granted time post hearing to file briefs. This time was extended up to and through January 12, 2001.

[2]CIGNA's Exhibits 11, 12, 15, and 16 were submitted post trial.

[3] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __, lines __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

restrictions. He continued working until June 17, 1991 and underwent a tibial osteotomy. After recuperating, he again returned to work for Pennzoil and remained until July 9, 1997. Claimant has undergone a total knee replacement, and he maintains that his current condition is an aggravation of his original injury under the aggravation rule resulting in an accident date of July 9, 1997, his last date of work with Pennzoil; CNA also maintains this position. CIGNA maintains that Claimant's current problems are the direct consequence and natural progression of the 1975 accident. In the alternative, Claimant maintains that his current condition is the natural progression of the 1975 accident;

4. Claimant's injury/accident occurred in the course and scope of employment;

5. An employer/employee relationship existed at the time of the injury/accident;

6. The date of Notification of Injury/Death to Employer and the date the Department of Labor was notified are both disputed;

7. Notice of Controversion was filed on December 10, 1999 by CIGNA, and February 23, 1999 by CNA;

8. An informal conference was held on July 7, 1999 and a recommendation was issued on December 1, 1999.

9. It is not disputed that Claimant's disability resulted from a work-related accident. It is disputed as to whether it is related to the first accident of June 21, 1975, or the last date on the job, July 9, 1997.

10. Medical benefits, under Section 7 of the Act, were paid to Claimant;

11. Claimant was paid 20 weeks of TTD from June 22, 1975 through December 17, 1975 for a total of $2,900.80. He was paid permanent partial benefits totaling $2,088.58 for a 5 % disability to the leg. No other compensation benefits have been paid. These benefits were paid with a weekly compensation rate of $145.02. No benefits have been paid since 1975, except medical;

12. Claimant's applicable average weekly wage is disputed. At the time of the June 21, 1975 accident, Claimant had an AWW of $217.56. At the time of his June 17, 1991 tibial osteotomy, he had an AWW of $892.46; as of July 7, 1997, Claimant had an AWW of $1,036.67; and

13. Maximum Medical Improvement has not been reached.

Unresolved Issues

The unresolved issues in this case are:

1. Whether CNA or CIGNA is responsible for Claimant's current medical treatment and bills; as well as compensation benefits, including but not limited to TTD and scheduled benefits;

2. The nature and extent of Claimant's injury and disability;

3. Claimant's AWW and compensation rate;

4. Claimant's entitlement to indemnity benefits;

5. Whether Claimant's current condition and disability is a natural progression of his June 1975 accident and injury or whether it is the result of a new injury under the aggravation rule arising from Claimant's continued employment offshore with Pennzoil through July 9, 1997;

6. Statute of limitations;

7. Attorney's fees, costs, penalties and interest; and

8. Whether Pennzoil is entitled to a credit against compensation benefits for monies paid to Claimant pursuant to Pennzoil's short and long term disability plan.

Statement of the Evidence

Testimonial and Non Medical Evidence

Claimant was forty-eight at the time of trial.[4] He resides in Louisiana with his wife and two children. Claimant graduated from high school and attended some college. Prior to working for Pennzoil, Claimant worked for different oil-related companies as a routsabout. He was also in the military service for two years.

In 1975, Claimant was hired by Pennzoil as a roustabout. That year, Claimant was injured while working offshore on a fixed production platform. He fell down some stairs and injured his left knee. He did not immediately seek medical treatment. Instead, he stayed out on the rig to finish his hitch.[5] When he came to shore, he did not seek medical treatment until a couple of weeks after the accident.

Claimant was examined by Drs. Drez and Akins. Claimant tore his knee cartilage, which required surgery. Claimant received a second opinion, at the request of Employer, and his surgery was approved. While Claimant was recuperating, he collected worker's compensation and short term disability. Dr. Akins assigned a 5 % disability to Claimant's left knee. Eventually, Dr. Akins released Claimant to return to work without restrictions. Claimant returned to Pennzoil as a roustabout. He testified that he had no problems with his knee upon returning to work.

After this surgery Claimant continued to play basketball with his children, as well as playing softball, and golf and hunting.[6] He testified that he never aggravated his knee while pursuing these activities.[7] He continued to deer hunt until 1996 or 1997. Claimant testified that he never injured or aggravated his knee while tending to

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[4]CIGNA's Exhibit 13 is Claimant's deposition. Since Claimant testified at trial, I will rely on this testimony, as opposed to his deposition testimony.

[5]Claimant worked seven days on and seven days off; 12 hour shifts.

[6]During trial Claimant stated that he never played softball after 1975. However, during his deposition, he stated that he played softball until "80-something."

[7]During Claimant's deposition, he stated "yes" to the question of whether climbing into a deer stand was painful on his knee.

his property or his cattle.[8] His sons helped him with the cattle. He did pen work until 1991, when he began to experience problems with his knee.

As a roustabout on a fixed platform, Claimant scrubbed decks, took boxes off of helicopters, changed oil in compressors, etc. Claimant worked his way through the ranks of roustabout to the position of operator in the late 70s. Claimant, in 1984, was promoted to senior lease operator, the highest level of operator. As an operator, Claimant's job duties changed. However, he still performed manual labor.

Claimant explained that, due to downsizing, two people worked two or three production platforms simultaneously.[9] Therefore, their work load tripled. During this time, there was no distinction between roustabout and operator. Each person had to perform all duties.[10] Claimant off-loaded boats, jumped on boats to read gauges, unloaded the helicopter and carried the unloaded cargo down stairs, maintained compressors and various equipment on the platform, assisted repairmen in performing necessary repairs, checked alarms and performed housekeeping duties in his living quarters.

Claimant worked on all decks of the multi-deck platform. To get from deck to deck, he climbed stairs. While performing various tasks, Claimant stooped, stood, walked, crawled, lifted and kneeled. The heaviest weight he lifted by himself was 150 pounds. Claimant, as operator, did whatever was necessary to keep his platform running.

Claimant began to experience pain and discomfort in his left leg and knee in late 1988. Claimant testified that between the 1975 incident and when he went back to Dr. Drez in 1991, he did not have any new accidents or injuries where he

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[8]Claimant lives on several acres of land in Lake Arthur and raises cattle. He continued to tend to his cattle until 1996, when he leased his cattle property. During Claimant's deposition, he stated "yes" to the question of whether performing chores around his house hurt his knee.

[9]Claimant testified that he worked on all size platforms, all multi-decked.

[10]This occurred over the last six or seven years Claimant worked at Pennzoil.

physically injured his left knee. In 1991, Claimant was examined by Dr. Drez. Dr. Drez recommended that a tibial osteotomy be performed. He indicated that Claimant would experience some relief from this surgery for ten to fifteen years, depending on Claimant's activity level. Claimant saw Dr. Leonard for a second opinion, who agreed with Dr. Drez's recommendation for surgery.[11] Claimant, therefore, had the tibial osteotomy. Dr. Drez increased Claimant's disability rating to 20 %. Employer paid for the doctor's visits and the surgery.

After the surgery, Claimant was off of work for about six months, from the middle of June 1991 until the middle of December 1991. While Claimant was out, he received short-term disability benefits, at full base pay. Claimant, however, did not receive worker's compensation or long-term disability benefits. No one from Pennzoil discussed worker's compensation with Claimant. It was Claimant's understanding that he could not receive worker's compensation and short-term disability payments. His medical expenses were paid by CNA.

Dr. Drez released Claimant to return to work without restrictions in 1991. Pennzoil did not change or modify Claimant's job duties, so Claimant continued working as an operator, performing the same tasks previously discussed. He experienced no problems with his left leg or knee after the surgery. Over a period of time Claimant's knee worsened, and he began to re-experience pain in 1996.

Claimant had right foot surgery in 1994 as a result of a work-related accident. He was off work for a few hitches and received short-term disability benefits. Claimant received a check from CIGNA.[12] He signed the check and sent it back to Pennzoil. Therefore, the only funds Claimant received was the short-term disability from Employer. It was Claimant's understanding that if he received money from

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[11]*See* CIGNA's Exhibit 10, Dr. Leonard's May 6, 1991 report concerning Claimant. Claimant disagreed with Dr. Leonard's statement that Claimant's pain started five years ago as a result of playing sports. The report also stated that Claimant had pain from stair climbing and walking. Claimant explained that he lived in single story house, so the only stairs he climbed were offshore. In addition, he only walked long distances while working offshore.

[12]*See* CIGNA's Exhibit 1, page 209-10.

Social Security, he could not also receive money from either the short-term or long-term plans.

After the foot surgery, Claimant continued to work at Pennzoil until July 1997. From the time Claimant went back to work for Pennzoil in 1991 until July 1997, he did not experience any new accidents or traumas to his left knee while working offshore. Claimant stopped working in 1997, because Dr. Drez advised against continued work that aggravated his left knee.

Dr. Drez recommended knee replacement surgery in 1997. Pennzoil refused to pay for this third surgery. Claimant ultimately had the surgery in May 2000. From July 1997, for a period of six months, Claimant received short-term disability benefits, at full base pay. He then received long-term disability benefits. During the short-term disability time frame, Claimant discussed possible on-shore jobs with Employer at the same base pay.[13] No one from Pennzoil advised Claimant to file a worker's compensation claim.

Claimant continues to be under the care of Dr. Drez, who has Claimant on a no-work status. As of the trial, Claimant had not reached MMI. Claimant has not engaged in any work since leaving Pennzoil in July 1997. Since July 1997, Claimant has not had any new accidents or traumas to his left knee.

During cross examination, Claimant discussed correspondence he received in 1992 from Continental, the predecessor to CNA, regarding a potential settlement of $6,000.[14] Claimant had discussed a possible settlement with Mr. Lawrence at the Department of Labor and Dr. Drez. Claimant decided not to take the settlement, because the estimated cost of his knee replacement surgery was $28,000. He anticipated that his future medicals would, therefore, exceed $6,000.

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[13]One job was found for Claimant at Pennzoil's Henry plant. However, because climbing down ladders was part of the job, Claimant did not believe he could safely perform this job. Pennzoil looked for dispatcher jobs for Claimant, but none were available in 1997 or 1998.

[14]*See* CIGNA's Exhibit 2.

After Claimant's original injury and surgery in 1975, Dr. Akins informed Claimant that future surgery was a possibility. Dr. Akins specifically explained to Claimant the problems associated with the "bone on bone" contact that would result from the meniscectomy. Claimant agreed that the problems he had in 1991 with the resulting surgery was a result of this "bone on bone" contact.

Claimant was asked about CIGNA's Exhibit 1, page 163, a reimbursement agreement for delayed or denied workers compensation claims. The form, signed by Claimant in 1991, indicated that if Claimant made a claim for worker's compensation benefits, he would reimburse the long-term disability plan in the event he did receive money from worker's compensation. However, Claimant, in 1991, did not receive long-term disability benefits. Claimant testified that he did not receive a copy of this form in 1997.

Claimant was asked about CIGNA's Exhibit 1, page 254, a form from Pennzoil, entitled "Certification of Health Care Provider." Both Dr. Drez and Claimant signed this form, dated September 1997. The form indicated that Claimant's "condition" began in 1975. Claimant had also indicated that his disability was due to an accident. Claimant testified at trial that his "accident" occurred in 1975.

CIGNA's Exhibit 12 is the deposition of Bryan Molaison, taken post-trial on October 18, 2000. He is currently employed by Devon Energy and Pennzoil as an environmental, safety and health representative.[15] He has been employed in that position since 1992. Prior to 1992, he was a production lease operator in the Gulf of Mexico for eight years. A production lease operator worked for the senior lease operator. As a production lease operator, Mr. Molaison was not in a position of authority on the platform. The senior lease operator had higher seniority and was the higher ranking officer in charge of the platform.

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[15]Exploration and Production Company merged in 1999. Prior to the merger, Mr. Molaison was employed by Pennzoil.

Mr. Molaison started working for Pennzoil in 1984, as a roustabout.[16] In 1989, Mr. Molaison worked with Claimant on the platform. They worked together for about one year. Mr. Molaison had been promoted to production lease operator and Claimant was the senior lease operator. In other words, Mr. Molaison was Claimant's assistant. These two men were the only employees to work this platform.[17] They worked their 12 hour shifts together during the day, and if a problem arose at night they would both work on solving it together.

In October of 1992, Pennzoil purchased several Chevron properties, which meant that the number of employees designated to each platform decreased. Instead of five or six people per platform, only two or three were present. The decreased number of employees meant an increased workload for the lease operator. Mr. Molaison testified that he believed he performed about 75 % of the "dirty work", which was the manual labor.

While on the platform, Mr. Molaison and Claimant made the rounds to ensure all of the equipment functioned correctly, changed valves, ran tests on wells, etc.[18] It was rare that heavy lifting was required to repair machinery. The majority of a lease operator's job was to read gauges and check fluid and liquid levels in vessels. Mr. Molaison described the job as non-strenuous. The job rarely required crawling, kneeling for extended periods of time, stooping, squatting or lifting.[19] Mr. Molaison testified that there were opportunities to alternate between standing and sitting. When supplies were delivered to the platform, occasionally Mr. Molasion and Claimant had to help the boat crew unload them. When groceries were

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[16]A roustabout's duties were similar to those of lease operator, according to Mr. Molaison. He made rounds, checked gauges and vessel levels, and loaded and unloaded supply boats or helicopters of its cargo. In addition, he performed general clean-up, chipping and painting. A roustabout's work was very strenuous because he performed most of the manual labor.

[17]However, Mr. Molaison later stated that the crew consisted of a production foreman, a senior lease operator (Claimant) and four other employees.

[18]Valves had to be changed, at most, every couple of months. The valves weighed in excess of 50 pounds.

[19]Mr. Molaison did not think that he ever had to lift weight in excess of 75 pounds.

delivered to the top deck of the platform once a week, both men had to unload and carry them to the galley. This required both bending and lifting.

In Mr. Molaison's experience, a lease operator was assigned to one platform on which he worked and lived during his hitch. Mr. Molaison explained the mechanics of "swinging off" in transferring a person from the platform to a boat, and vice versa. He considered this process to be a non-strenuous procedure. This procedure was only employed if the platform was unmanned. If the structure was manned, then the person entering the platform would utilize the personnel basket that was lifted with a crane. By the time Mr. Molaison worked with Claimant in 1989, the platform was manned.

Mr. Molaison stated that most of the platforms in the Gulf were two-tiered. The top deck contained the living quarters and the galley. The production deck, or the deck below the top deck, contained most of the production equipment, pumper shack and office. Little stair climbing was required to perform work on this lower deck.[20] However, the lease operator had to climb stairs to do work on the top deck. The platform also contained a Plus-10, or a walkway around the lower level. To get from the production deck to the Plus-10, it was necessary to go down a stairwell. It was also necessary to go up a stairwell, when moving from the top deck to the heliport. Mr. Molaison testified that the position of senior lease operator has not changed in any significant way since he stopped working offshore in 1992.

In October of 1992, Mr. Molaison became the senior safety and health representative. His job dealt with employee accidents and injuries that resulted in missed work time. He worked both onshore, in an office, and off-shore. If an accident occurred off-shore, Mr. Molaison went to the site to investigate the incident. He was not responsible for filling out the LS-202 or the employer's first

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[20]Mr. Molaison explained that the production deck contained a wellhead area. In order to go into that area, the lease operator would have to climb about 5 steps. However, he stated that it was rare that the operator would have to check that area.

report of the accident or injury.[21] Mr. Molaison testified that he saw Claimant from 1992 until 1997 about four times in the field. He did not see Claimant on a regular basis.

Mr. Molaison was aware of Claimant's situation in 1997 when Claimant was declared disabled from continuing to work offshore. As part of Mr. Molaison's job, he examined Claimant's situation to determine whether he had had a new accident. It was determined that Claimant's 1997 injury stemmed back to the original injury of 1975. Mr. Molaison was unaware of any other injuries to Claimant's left knee at Pennzoil, other than the one in 1975.

Mr. Molaison testified that an LS-202 was never submitted in 1997 when Claimant stopped working because, no new specific injury to Claimant had occurred. It was Mr. Molaison's belief that Claimant's 1997 injury was related back to his prior injury of 1975.

CIGNA's Exhibit 15 is the deposition of Mark Maneen, taken post-trial on November 10, 2000. Mr. Maneen is the case management specialist at MetLife. He handles long-term disability (LTD) claims submitted by companies and reviews them for eligibility with regards to LTD benefits. Claimant submitted his claim package to Pennzoil, who in turn submitted it to MetLife. MetLife administered the LTD Plan (Plan) for Pennzoil. As described in the Plan, Pennzoil, now Devon, made the final decision of whether or not Claimant was entitled to benefits.

The merger or sale or acquisition between Pennzoil and Devon Energy had no effect on how MetLife administered the Plan. The LTD Plan for Devon Energy was the same plan as the one in effect when the Plan was administered for Pennzoil.

The Plan is a general Long-Term Disability Plan offered to eligible employees of Pennzoil. It covers an illness or any disability that arises out of any illness, injury or accident, work-related or otherwise. This Plan is separate from worker's

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[21]He was, however, responsible in providing the accident information to the people who filled out such forms.

compensation. The language of the Plan is explained in the "Plan Document for Pennzoil Company, Plan Number 38288." [22]

Worker's compensation benefits and long-term disability benefits are mutually exclusive. If a worker receives LTD benefits and is subsequently awarded worker's compensation benefits for the same period in which he previously received LTD benefits, the Plan provides for a repayment of monies by the worker for those paid benefits. In order to collect repayment, MetLife applies a reduction to the claim, at the time in question, at the amount stated.[23]

Mr. Maneen was asked about CIGNA's Exhibit 14, a letter he wrote to CIGNA's attorney, dated September 28, 2000.[24] The letter explained that if Claimant had received a lump sum award of past due worker's compensation benefits that coincided with past paid LTD benefits, MetLife would seek a recoupment of its money from any future exposure the Plan may have had with regard to future LTD benefits. Mr. Maneen was asked whether Pennzoil's Benefit Book, called the Salaried Red Book, made a distinction between lump sum settlement or lump sum award from a Court Order.[25] There was no distinction.[26]

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[22]This document is found at the conclusion of Mr. Maneen's deposition.

[23]Mr. Maneen explained the "amount stated." MetLife would receive the award information, convert the weekly rate into a monthly rate to concur with the LTD Plan, and that amount would be applied to the claim as a reduction for the time period stated in the award letter.

[24]*See also* CIGNA's Exhibit 7, a letter dated October 5, 2000, sent by Mr. Maneen to CIGNA's attorney. It discussed the benefits Claimant received in 1998.

[25]This documentation was found at the end of Mr. Maneen's deposition.

[26]Mr. Maneen referred to the Plan with regards to the definition of a lump sum award. It is Mr. Maneen's opinion that a lump sum award would include "an award, a settlement, a compromise or any other determination which results or will result in payment or entitlement to any amounts."

Mr. Maneen has handled Pennzoil claims for the past six years and has handled LTD claims for Pennzoil employees who were also receiving worker's compensation benefits. However, he has never handled a claim similar to Claimant's, where the employee first received LTD benefits and then was awarded worker's compensation benefits.

CIGNA's Exhibit 16 is the deposition of William St. Clair, taken post-trial on November 10, 2000. He is currently employed by Devon Energy Corporation. Devon Energy bought the Pennzoil Oil and Gas Company in 1999. Mr. St. Clair retired from the Pennzoil Company on January 1, 1999. He has been working with Devon Energy on a contract since January 1, 2000.

Prior to his retirement, Mr. St. Clair was the Director of Benefits for Pennzoil. His job was to oversee the administration of the employee benefit plans, such as the retirement plan, 401(k), medical, dental, life, LTD, short-term disability and employee benefit programs. Mr. St. Clair was familiar with the Salaried Red Book, which contains a detailed description of the LTD Plan, in addition to other plans.[27]

The LTD Plan was designed to provide benefits to an injured or ill worker, regardless of whether his injury or illness was work related. As long as the employee sustains an injury or illness that results in total disability, as defined by the Plan, he receives LTD benefits. The benefits received by the employee is 60% of his monthly income. The LTD program was established to offset any benefits that an employee received through worker's compensation, other disability plans, or Social Security. Mr. St. Clair agreed that, according to the Plan, the worker can not receive double benefits under both the LTD plan and worker's compensation program. Even though LTD benefits and worker's compensation are mutually exclusive, if the employee's worker's compensation benefit is smaller than the LTD benefit, the employee will receive a partial LTD benefit so his combined total equals 60 % of his pay.

[27]A copy of the Salaried Red Book was found at the end of Mr. St. Clair's deposition.

Mr. St. Clair explained that if an employee received LTD benefits and was awarded worker's compensation benefits for the same period in which he had previously received LTD benefits, the LTD Plan would seek to recover the benefits it had previously paid to the employee. When a covered employee applies for LTD benefits, he signs certain contractual forms authorizing Pennzoil to seek reimbursement. Even if such forms were not sent, Pennzoil or MetLife would still attempt to recover any overpayments because the Plan provisions provide for an offset of worker's compensation. If the employee was awarded a lump sum payment, Mr. St. Clair believes that the Plan is set up so that the employee's repayment amount is payable over a five year period and offset accordingly. The final decision regarding reimbursement and eligibility for benefits is made by Pennzoil; MetLife is simply the claims administrator.

Mr. St. Clair was asked about the following hypothetical: A worker was injured and qualified for LTD benefits under the Plan. He received these benefits. He later filed a lawsuit and was awarded compensation, both in the future and to be applied retroactively during the same period in which he received LTD benefits. Mr. St. Clair responded that the Plan would attempt to recover the LTD payments previously paid to the employee from the lump sum payment that was awarded. The Plan would then offset future payments for the worker's future compensation award.

Employer's Exhibit 1, Employer's Exhibit 2 and CIGNA's Exhibit 6 an Employer's Report of Injury, dated July 29, 1975 and Employer's Supplementary report of accident/illness, dated February 5, 1976. Claimant began work with Pennzoil on January 2, 1975. On June 21, 1975, as Claimant was walking on offshore platform, Eugene Island Block 330, he caught his left foot in between stair rungs. He twisted, fell, and injured his left knee. Claimant eventually returned to work on December 18, 1975.[28]

[28] *See* Employer's Exhibit 3.

CIGNA's Exhibit 2 is a letter from Ralph Pender, Continental Loss Adjustering Adjustor, addressed to Claimant, dated December 8, 1993.[29] Apparently, Claimant was owed the difference of 15 % because his disability rating increased from 5 % to 20 %. Included was the computation of such benefits.

CIGNA's Exhibit 5 is Form LS-203, Employer's claim for compensation, dated April 5, 1999. It stated the date of injury as June 21, 1975.

Claimant's Exhibit 1 is an itemized statement of earnings from the Social Security Administration, dated July 26, 1999. Claimant's Exhibit 2 is correspondence from Donna Boudreaux, Coordinator, Human Resources, Offshore Division of Pennzoil, addressed to Claimant, dated April 6, 1999, regarding Claimant's compensation and claim. She stated that, while Claimant had a work-related injury in 1975, his claim has been closed for 20 years and is no longer compensable. Claimant's Exhibit 3 is correspondence between attorneys and the Department of Labor in 1999. Claimant's Exhibit 4 is copies of correspondence, liens, statements and explanation of benefits regarding outstanding medical bills.

CIGNA's Exhibit 1 is Claimant's personnel file, while employed by Pennzoil. Claimant received short term disability benefits from June 17, 1991 to December 17, 1991, at full pay. Pennzoil filed an LS-210, which stated that Claimant's date of accident was June 21, 1975. Also included was a reimbursement agreement, signed by Claimant on October 1, 1991, whereby Claimant agreed to reimburse Pennzoil for monies received from social security and worker's compensation, that coincided with LTD payments. Claimant wrote a letter to Pennzoil detailing the number of his visits to the doctor and therapy, and the resulting round trip mileage.

Medical Evidence

CIGNA's Exhibit 1, Claimant's personnel file, included medical documents. Claimant first received medical attention for his injury on July 25, 1975, by Dr. John

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[29]CNA bought Continental Insurance Company. *See* CIGNA's Exhibit 3, CNA's answers to interrogatories.

H. Sabatier. Claimant suffered a cartilage injury. Claimant was next evaluated by Dr. William Akins, an orthopedic surgeon, on August 4, 1975. Dr. Akins opined that Claimant had suffered a medial meniscus tear in his left knee. Dr. Akins treated Claimant and on August 27, 1975 determined that Claimant was not to return to offshore work because of his knee injury. Claimant was sent to Dr. Ambrister for a second opinion regarding knee surgery. Dr. Ambrister agreed with Dr. Akins. Claimant, therefore, had a meniscectomy of the left knee on October 2, 1975. Dr. Akins released Claimant to return to work on December 18, 1975. Dr. Akins assigned a 5 % disability to the leg for removal of a meniscus.

CIGNA's Exhibit 9 and Employer's Exhibit 6 is the deposition of Dr. Drez, taken on October 18, 1999.[30] Dr. Drez is board certified in orthopedic surgery. He is on staff at Lake Charles Memorial Hospital, St. Patrick's Hospital, and West Calcasieu Cameron Hospital. He also works at the Center for Orthopedics.

Dr. Drez first examined Claimant in March 1991. Claimant provided a history of a work injury in 1975 that had required knee surgery, performed by Dr. Akins. Claimant stated that he did well after the surgery, but that about 6 years later he began to re-experience pain along his inner knee while performing activities. The pain increased, as did the swelling and popping in his knee. Based on the examination and x-rays, Dr. Drez opined that Claimant had "severe arthritic changes in the medial compartment, which is on the inner side of the knee where he had his meniscus or cartilage removed, and he had a bow leg deformity of varus alignment." (page 7) In other words, Claimant had "medial compartment arthritis in his left knee."

Dr. Drez recommended that Claimant have a tibial osteotomy because of the severe change in Claimant's knee, coupled with Claimant's age and employment. Therefore, on June 18, 1991, Dr. Drez performed the osteotomy. Claimant's recovery was uneventful. Dr. Drez examined Claimant during several follow-up visits. Dr. Drez released Claimant to go back to work on full duty on October 1, 1991. Claimant stated that he was able to work offshore without any difficulty. Dr. Drez gave Claimant a 20 % impairment rating to his extremity. Dr. Drez stated it

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[30]Employer's Exhibit 4 and CIGNA's Exhibit 8 is the records of Dr. Drez.

was a strong possibility that Claimant would need future medical treatment with regards to his knee.

Dr. Drez next examined Claimant on June 2, 1997. Claimant explained that over the past year (1997), he had increased pain in his knee with accompanying grinding and swelling. Claimant commented that he was now a "one-legged man" because he had been transferring his weight to the other leg. Claimant also mentioned that, during work, he had to climb stairs and squat. After the examination and review of x-rays, Dr. Drez opined that Claimant had progressive arthritic changes in his knee. Dr. Drez explained that if Claimant continued to perform heavy types of work, he would eventually have to have a total knee replacement.

Dr. Drez examined Claimant on July 14 and August 28, 1997. Claimant had continued complaints of pain. Dr. Drez recommended that Claimant consider retiring or working in a position that did not require such strenuous activity as offshore work. Dr. Drez examined Claimant again on September 11, 1997, at which time he placed Claimant on a no-work status. On December 18, 1997, Dr. Drez examined Claimant and kept him on no-work status. It was Dr. Drez's opinion that if Claimant was going to work offshore, he "would have a more likely probability of hastening the arthritic changes in his joint." (page 20)

Dr. Drez explained that Claimant had an arthritic condition to his left knee. "A load to an arthritic joint will cause it [arthritis] to progress more rapidly than it would if one were not doing that." (page 18) Stair climbing would only be a minor factor in Claimant's knee problem. However, pushing and lifting activities would hasten arthritic changes.

Dr. Drez examined Claimant on April 30, 1998. Claimant's problems with his knee had increased. It was not getting better. Dr. Drez again examined Claimant on July 20, 1998. Claimant was taking up to 12 Tylenol per day without any relief. On February 11, 1999, Dr. Drez examined Claimant. He recommended a total knee replacement because Claimant's condition was progressively worsening, with constant pain in the left knee.

On March 1, 1999, Dr. Drez examined Claimant. Claimant decided that he wanted the total knee replacement, but the question remained as to who would pay for the procedure. On March 30 , 1999, Dr. Drez operated on Claimant to remove the hardware that had been placed in his knee joint from the tibial osteotomy.[31] Dr. Drez examined Claimant on follow-up visits. Claimant did well after the surgery. Dr. Drez performed the total knee replacement on May 3, 2000.

Dr. Drez's deposition occurred prior to Claimant's total knee replacement. Following the total knee replacement, Dr. Drez opined he would assign restrictions preventing Claimant from climbing, squatting, kneeling, running or jumping. In other words, he would prefer Claimant work a sedentary job. With a successful surgery, Dr. Drez usually assigns a 15 % impairment to the person and a 37 % impairment to the extremity. If the surgery has a poor result, Dr. Drez assigns a 30 % impairment to the whole person, and a 75 % impairment to the extremity.[32]

Dr. Drez testified that Claimant's need for a knee replacement was ultimately related back to his original injury of 1975. Dr. Drez explained that a median meniscectomy eventually results in arthritis of the joint. A tibial osteotomy was not a curative operation, because the results can only last a maximum of 10 years. After 10 years, almost everyone has more arthritis with pain. Therefore, people either discontinue their activities because of the pain, or undergo a total knee replacement because of advanced arthritis. Dr. Drez stated that Claimant's condition was no different than anyone else's. Claimant had a "natural history, or what happens to somebody who's had a total meniscectomy." (page 23)

Dr. Drez was asked whether or not Claimant's non-work related activities, such as working in the field with cows or climbing deer stands, would cause load-bearing stress on Claimant's knee, therefore aggravating his condition. His answer was vague. However, he stated that "running after cows, running through the

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[31]This surgery had to be performed prior to the total knee replacement surgery.

[32] Because Claimant is not at maximum medical improvement an impairment rating has yet to be assigned.

woods, and walking on un-level ground" are more activities than those who work in an office perform on a daily basis.

Claimant returned to Dr. Drez 6 years after having the tibial osteotomy performed, not the ususal 10 years. In response to whether or not from 1991 to 1997, Claimant's work on the platform hastened his knee problem, Dr. Drez replied: "I can tell you that if he were doing things that we talked about that imposed significant increased loads other than normal activities, that it would more than likely hasten the arthritic changes." (page 26)

From 1975 through the early 1980's, Claimant was a roustabout, working a 7 day hitch, 12 hours per day. The Department of Labor described the job of roustabout as heavy manual labor. It involved lifting weights in excess of 100 pounds, standing on one's feet all day, loading and unloading supply vessels, performing general maintenance, extensive walking and repeatedly climbing multiple flights of stairs. Dr. Drez agreed that this type of work activity would put a great load on one's knee.

In the 1980s, Claimant became an operator. That work was also described as heavy labor, involving repetitive squatting, kneeling, extensive stair climbing, and extensive amounts of time on one's feet. It was Dr. Drez's opinion that "it was more probable than not, that the type of work activity from 1975 until 1991 sped up the degenerative process resulting from Claimant's 1975 accident." (page 29) It was also Dr. Drez's opinion that if Claimant continued that type of work activity from 1991 until 1997, it was more probable than not that type of activity sped up the degenerative process and advanced the need for Claimant's total knee replacement.

In Dr. Drez's notes, most of Claimant's complaints referred back to working on the offshore platform for Pennzoil. It was Dr. Drez's opinion that if Claimant had not performed such heavy labor while working offshore, he would probably not have needed a total knee replacement at age 40, but later in life at age 65 or 70.

CIGNA's Exhibit 11 is the deposition of Dr. J. Lee Leonard, taken post-trial, on October 18, 2000.[33] He is a board certified orthopedic surgeon. Dr. Leonard examined Claimant on May 1, 1991, on behalf of Pennzoil. The purpose of the examination was to provide a second opinion regarding the osteotomy recommended by Dr. Drez.

According to Dr. Leonard's report, dated May 6, 1991, Claimant told Dr. Leonard that he twisted his knee in June 1975. Dr. Akins performed a medial meniscectomy and Claimant returned to work five to six months later. Claimant explained to Dr. Leonard that he began to re-experience pain five years ago, in 1986, while playing sports. Claimant never indicated that he was having any particular pain with a specific work activity. However, Claimant never explained to Dr. Leonard what his job at Pennzoil entailed. Claimant did mention, though, that he had pain climbing stairs and walking long distances. Dr. Leonard ultimately agreed with Dr. Drez and recommend that an osteotomy be performed.

Dr. Leonard explained that when the meniscus is removed from the knee, "bone on bone" contact results. After the meniscectomy, Claimant was pain free for about 11 years. Then, he began re-experiencing pain. An osteotomy was therefore performed in 1991 to help alleviate the pain.

Dr. Leonard was not surprised that a person who had his meniscus removed in 1975 would need an osteotomy in 1991. In fact, he explained that was a fairly typical treatment pattern. Dr. Leonard stated that this treatment pattern was typical in people that performed heavy manual labor or light to sedentary work. It is a frequent occurrence for a person who had his meniscus removed to also need an osteotomy, and then later need a total knee replacement. "I've probably done total knee replacements on six or seven people that I had done osteotomies on within the last 10 to 12 years." (page 12)

Dr. Leonard has not seen or heard anything concerning Claimant since his 1991 examination. Knowing that Claimant had an osteotomy in 1991 and his condition at that time, Dr. Leonard was not surprised when told that Claimant had a

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[33]CIGNA's Exhibit 10 is Dr. Leonard's medical report.

total knee replacement. Dr. Leonard expects his patients to only get between six and ten years of relief from the osteotomy.

Dr. Leonard explained that a person who had an osteotomy would eventually need a total knee replacement, regardless of the amount of activity that person performed in the interim. Any type of physical activity for a patient who has a tibial osteotomy would speed up the need for the ultimate knee replacement. "I've done total knee replacements on three or four women in the last couple of years that I did osteotomies eight, nine, ten years ago, and they're just housewives." (page 18)

Dr. Leonard stated that some of his patients that underwent tibial osteotomies returned to offshore activities. Most of his patients go back to work. Dr. Leonard agreed that any physical activity that put stress on Claimant's knee would speed up the ultimate outcome of a total knee replacement. Dr. Leonard defined "physical activity" as "any physical activity beyond laying down with the knee propped up." (page 22)

The types of activities that are most injurious would be jogging, speed walking and repetitively jumping off of a four or five foot distance. Basically, any activity that jarred the knee. Dr. Leonard agreed that any weight-bearing activity would be harmful to Claimant. Knowing that Claimant had both a meniscectomy and osteotomy, in addition to Dr. Leonard's understanding of typical offshore work, Dr. Leonard stated that there would be nothing inherently unique in Claimant's offshore work that would be more damaging to him than his everyday life, with regard to this specific type of injury.

Considering Claimant's weight, the type of injury he endured in 1975, and the type of procedure that was performed, Dr. Leonard believed that it was expected in 1975, that at some point Claimant would need an osteotomy, and subsequently a total knee replacement.

Claimant's Exhibit 5 is the deposition of Dr. G. Gregory Gidman, taken April 11, 2000.[34] Dr. Gidman performed an independent medical examination of Claimant on behalf of CIGNA. Dr. Gidman is a certified Independent Medical Examiner. He also has a non-surgical orthopedic practice. Dr. Gidman is board certified in orthopedic surgery.

Dr. Gidman examined Claimant on February 8, 2000. He took Claimant's history, looked at x-rays and rendered an opinion. Dr. Gidman agreed with Dr. Drez's 20 % impairment rating after the osteotomy was performed. According to the x-rays, Claimant had "bone on bone" contact, and under the AMA guidelines, such contact is rated as a 20 % whole body impairment. The purpose of the osteotomy was not to cure Claimant's problem, but to alleviate the pain and buy time before he needed a total knee replacement.

Based on Claimant's medical history and the 1991 osteotomy, as well as the state of his knee after surgery, Dr. Gidman was not surprised that Claimant needed a total knee replacement. Dr. Gidman stated that Claimant had a very classic and very common long-term history of a patient who had a meniscectomy. He agreed that the damage to Claimant's medial compartment was done prior to 1991, because by 1991, Claimant had no cartilage left in his knee.

Stressful factors that would have an impact on Claimant's knee included Claimant's weight, prolonged standing, climbing, squatting, kneeling, riding bicycles, climbing stairs, and carrying objects weighing 25 to 50 pounds. The fact that Claimant was overweight would be detrimental to his knee, because it was a load above normal.

Dr. Gidman opined that Claimant's current knee problem and his need for a total knee replacement was the natural progression of the injury sustained in 1975; however, he also acknowledged working offshore may have accelerated "some of the wear and tear of the knee, but I think it was his basic primary disease that led to the need for" a total knee replacement. (page 49) "This is a very characteristic

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[34]Employer's Exhibit 5 is Dr. Gidman's medical report.

long term scenario with an early meniscectomy." (page 27) Whether Claimant performed weight bearing activities at home, at work, or as recreation, the affect would be the same. Dr. Gidman agreed that it was common for individuals who have had the type of injury Claimant sustained in 1975, with the types of procedures performed on him, that they may need a total knee replacement, even if they participate in a more sedentary occupation, like a doctor or a lawyer, or someone with a desk job. He believed that whatever job Claimant performed following his 1975 initial injury, he would ultimately need a knee replacement.

Claimant returned to offshore work, as an operator engaged in heavy manual labor, following his tibial osteotomy. Upon hearing that, Dr. Gidman remarked that Claimant must have had a great result from his surgery. Dr. Gidman would have cautioned Claimant that such heavy manual activities would stress the knee. Dr. Gidman testified that Claimant, regardless of where he worked, would have ultimately needed a total knee replacement. The work Claimant performed offshore sped up the process, but the end result was the same. If Claimant had not engaged in such stressful work offshore, he probably would not have worn out his knee as quickly, but he still would have needed the knee replacement at some point in his life. Dr. Gidman believed that the "crux" of Claimant's problem was the removal of cartilage in 1975.

Dr. Gidman agreed with Dr. Drez's recommendation for Claimant's total knee replacement, at age 47. The impairment rating would depend on the success of the total knee replacement. If Claimant had a good result from the surgery, the impairment rating would be 37 % to the lower extremity or 15 % to the whole body. If Claimant had a fair result, then 50% to the lower extremity or 20 % of the whole body would be assigned as the impairment rating. If Claimant had a poor result from the total knee replacement, then an impairment rating of 75 % of the lower extremity or 30 % of the whole body would be assigned. Dr. Gidman explained that after the total knee replacement surgery, Claimant would no longer suffer from arthritis, because the knee would be taken out and replaced.

Dr. Gidman testified that the duration of a knee prosthesis depends on the age of the individual, how well he takes care of it, and the weight of the individual. The more activity a person engaged in will "hasten the pace" for another knee replacement. Assuming Claimant had a "good result" from the total knee

replacement, Dr. Gidman would restrict his activities involving kneeling, squatting, climbing stairs, running and jumping. Claimant also needed to lose weight. Dr. Gidman believed, given Claimant's age, that Claimant would have a speedy recovery from the surgery.

Causation

Section 20 (a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20 (a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984). It must be further recognized that all factual doubts must be resolved in favor of Claimant. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir. 1969). Furthermore, it has been consistently held that the Act must be construed liberally in favor of Claimant. *Voirs v. Eikel*, 346 US 328, 333 (1953); *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20 (a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

The parties stipulated in Joint Exhibit 1 that Claimant originally injured his knee on June 21, 1975, and underwent a meniscectomy. Dr. Akins assigned Claimant a 5% disability rating and returned Claimant to work without restrictions. Claimant continued working until June 17, 1991, when he began to re-experience pain, and underwent a tibial osteotomy. Dr. Drez gave Claimant a 20 % disability rating. After recuperating, Claimant again returned to work for Pennzoil and remained there until July 9, 1997, when Dr. Drez placed Claimant on no-work status. In May 2000, Claimant underwent a total knee replacement. The parties

stipulated that Claimant's injury/accident occurred in the course and scope of employment and that an employer/employee relationship existed at the time of the injury/accident.

Claimant's meniscectomy and tibial osteotomy have both been paid for by CNA. The parties do not dispute that Claimant's present disability results from a work related accident. Rather, it is disputed as to whether Claimant's disability is related to his original injury of June 21, 1975, or the last day on the job, July 9, 1997. In other words, did Claimant aggravate his knee condition and sustain a new injury or was his injury the natural progression of the 1975 accident?

If the claimant's disability results from the natural progression of the first injury, then the claimant's employer/carrier at the time of the first injury are the responsible parties. If his employment thereafter aggravates, accelerates or combines with the earlier injury, resulting in the claimant's disability, claimant has sustained a new injury and the employer/carrier at that time are the parties responsible for the payment of benefits thereafter. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (*en banc*), *McKnight v. Carolina Shipping,* 32 BRBS 165, *aff'd on recon. en banc,* 32 BRBS 251 (1998). Section 20(a) of the Act, 33 U.S.C. §920(a), is inapplicable to a determination of the responsible party *Buchanan v. Int'l Transportation Services,* 31 BRBS81 (1997). The first employer/carrier bears the burden of proving that there was a new injury or aggravation with the second employer/carrier in order to be relieved of liability as responsible parties. The second employer/carrier, on the other hand, must prove that claimant's condition is solely the result of the injury with the first in order to escape liability. A determination as to which is liable requires the administrative law judge to weigh the evidence as a whole, and to arrive at a conclusion supported by substantial evidence. In this instance, I find Claimant's disability is the result of his continued employment after 1975 and 1991 because his subsequent employment aggravated and accelerated his need for a knee replacement.

In 1975, after Claimant recuperated from the meniscectomy, he went back full duty to Pennzoil as a roustabout. His job was considered heavy manual labor. His duties included lifting weights in excess of 100 pounds, standing on his feet all day, loading and unloading supply vessels, performing general maintenance,

extensive walking and repeatedly climbing multiple flights of stairs. Claimant testified that he performed all of these activities while working on the offshore platform. In the late 1970's, Claimant became an operator, and by 1984 had risen in the ranks to senior lease operator. His job duties changed, but he still continued to perform manual labor.

In the early 1990's Pennzoil downsized, which resulted in fewer workers on the platform. Claimant stated that it was usually him, as senior lease operator, and one roustabout who worked on the platform. Since only these two men were present on the platform, they performed all of the duties. Claimant performed whatever work was necessary to keep the platform running.

Dr. Akins operated on Claimant's left knee on October 2, 1975, and returned Claimant to work with a 5 percent disability on December 18, 1975. As previously described, the work Claimant performed thereafter involved walking, climbing, squatting and heavy lifting. For approximately six years Claimant continued to perform his job duties without problems. However, knee pain eventually returned. Because of the serious changes in Claimant's knee due to his age and employment, Dr. Drez recommended, and performed on June 18, 1991, a tibial osteotomy. Claimant was returned to work on October 1, 1991, with a 20 percent impairment rating.

Upon returning to work, Claimant again went offshore and performed the same type of duties he had in the past. These work activities continued until 1997 when Claimant returned to Dr. Drez, who informed Claimant if he continued to perform heavy work he would need a knee replacement. In Dr. Drez's opinion, offshore work, including pushing and lifting, can hasten arthritic changes in an arthritic knee.

Claimant was taken off work by Dr. Drez in July, 1997, and on March 30, 1999, Dr. Drez removed the hardware in Claimant's knee that had been placed there during his tibial osteotomy. This surgery was performed in preparation for a total knee replacement which occurred on May 3, 2000. Claimant has yet to be given an

impairment rating following that operation, for he has not reached maximum medical improvement.

When asked whether or not Claimant's continued work from 1975 until 1997 hastened Claimant's degenerative process and hastened his need for a total knee replacement, Dr. Drez opined that it probably did. Had Claimant not engaged in the type work he did, Dr. Drez thought his need for a knee replacement could have been postponed until he was 65 or 70 years of age.

Dr. Gidman performed an independent medical evaluation on Claimant on April 11, 2000. While he believed Claimant's knee replacement was a progression of Claimant's early meniscectomy, Dr. Gidman agreed that the heavy manual activities Claimant performed offshore sped up the process. Had Claimant not continued to perform such stressful work offshore, Dr. Gidman opined Claimant might well have postponed his need for knee surgery until later in life.

Dr. Leonard examined Claimant in 1991 to provide a second opinion regarding his then need for an osteotomy. He has not seen Claimant since 1991. Dr. Leonard agreed that Claimant's pattern then was typical, for when a meniscus is removed it is not unusual that an osteotomy is later performed to eliminate the reoccurrence of knee pain. Neither was he surprised to learn Claimant had a knee replacement. Such surgeries, according to Dr. Leonard, often follow in time an osteotomy. While he refused to place Claimant's ultimate need for a knee replacement on his continued offshore employment, interestingly, Dr. Leonard did state that stress on the knee is something to avoid while recuperating from knee surgery.

In sum, I find the testimonies of Drs. Drez and Gidman, when read closely, cause one to conclude that Claimant's continued work activities offshore from 1975 until 1997 accelerated his knee condition and his need for further surgeries. Dr. Leonard saw Claimant once in 1991, and I do not accept his opinion over that of Claimant's treating physician, Dr. Drez, as supported by Dr. Gidman.

Because I accept Drs. Drez and Gidmans' opinions, I find CIGNA to be the responsible carrier in this claim since they provided coverage at the time Claimant last worked for employer in July 1997.

Statute of Limitations: Section 13 Notice Requirement

Employer/Carrier argue that §913 bars Claimant's recovery because following Claimant's June 1975 injury, Claimant failed to file under the LHWCA until April 1999. Section 20(b) provides a presumption that a claim is timely filed, and the burden is upon Employer/Carrier to prove otherwise.

Section 13 (a) of the Act provides, in pertinent part,

> "...[T]he right to compensation for disability... under this Act shall be barred unless a claim therefor is filed within one year after the injury... If payment of compensation has been made without an award...a claim may be filed within one year after the date of the last payment... The time for filing a claim shall not begin to run until the employee... is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury... and the employment." 33 U.S.C. 913(a).

The one-year limitation period does not commence to run until the employee "has been put on alert as to the likely impairment of his earning power." *Stancil v. Massey*, 436 F.2d 274, 277 (D.C. Cir. 1970)

Under Section 930(a) of the Act, within 10 days of an injury/occurrence which causes the loss of one or more shifts of work, the employer is required to submit a report detailing its name, address and business, the employee, his address and occupation, the cause and nature of the injury, as well as the year, month, date, hour and geographical location of the injury to the Secretary of the Department of Labor and the deputy commissioner of the compensation district in which the injury occurred. Section 930(f) states that if an employer or carrier fails or neglects to give notice as required by §930(a), then the time limitations of §913(a) do not begin

to run against the claimant until the report is furnished as required. *Hartman v. Avondale Shipyard*, 23 BRBS 201, 204, *modified on recon.*, 24 BRBS 63 (1990); *Ryan v. Alaska Constructors*, 24 BRBS 65 (1990); *Cooper v. John T. Clark and Son, Inc.*, 11 BRBS 453 (1979), *aff'd* 687 F.2d 39, 15 BRBS 5 (CRT)(4th Cir. 1982). Even if the case arises under a statute other than the LHWCA, an employer is not excused from the filing requirement. *Ryan*, 24 BRBS at 65; *Cooper*, 11 BRBS at 453.

Pennzoil filed their First Report of Injury on July 29, 1975, 4 days after Claimant was first examined by a doctor and received medical treatment. Dr. Akins performed a meniscectomy and gave Claimant a 5 % impairment rating. Claimant was paid compensation for the 5 % disability. Pennzoil subsequently filed a Supplemental Report of Injury on February 5, 1976. Claimant is satisfied with the benefits he received following his 1975 injury.

On June 18, 1991, Dr. Drez performed a tibial osteotomy and gave Claimant a 20 % impairment rating. Claimant returned to work. Pennzoil filed their Supplemental Report of Injury on June 25, 1991, in connection with Claimant's increased disability rating. Pennzoil, therefore, satisfied §930(f) with regard to the commencement of the limitation period established in §913. Settlement was discussed, but not accomplished; however, Claimant never filed a claim for temporary total disability or increase in schedule disability regarding that 1991 occurrence. Because of this failure to do so, I find that Claimant's claim for temporary total disability following his 1991 surgery has prescribed.[35]

Following his departure from work in July, 1997, Claimant did not file a claim for compensation until April 5, 1999, almost two years after Claimant left his employment with Pennzoil. However, neither Pennzoil nor CIGNA filed a first report of accident (202). Therefore, despite the fact Claimant's claim was filed more than one year, his claim for benefits from July 10, 1997, is not prescribed.

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[35]Dr. Akins assigned Claimant a 5 % impairment after the meniscectomy in 1975, for which Claimant was paid. Dr. Drez assigned a 20% impairment after the osteotomy in 1991. Claimant, therefore, suffered a 15 percent increase in disability for which he has not been paid. I will not, however, address the issue of Claimant's entitlement to the 15% increase at this time, because Claimant has yet to reach maximum medical improvement and receive a revised, if any, impairment rating.

Credit for Short and Long Term Benefits

The prohibition against double recovery is a fundamental principle of worker's compensation law. An injured employee should not receive duplicate compensation from two different sources for the same injury. 33 U.S.C. §§ 903(e), 914(j). In some instances, courts allow an employer a credit for benefits paid to an employee to the extent that the credit would prevent double recovery by the employee for the same disability. *Artis v. Norfolk & Western Railway Co.*, 204 F.3d 141 (4th Cir. 2000).

Section 914(j) of the Act states that "if the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." Section 914(j) allows the employer a credit for its prior payments of compensation against any compensation subsequently found due. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (1989), *on recon., aff'd*, 23 BRBS 241 (1990); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413, 415 (1989); *Mijangos v. Avondale Shipyards*, 19 BRBS 15, 21 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 79 (CRT) (5th Cir. 1991). If the employer pays benefits and intends them as advance payments of compensation, the employer is entitled to a credit under Section 914(j). *Mijangos*, 19 BRBS at 22. *See also Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312 (5th Cir. 1997).

The employer is not entitled to a credit for payments made under a non-occupational insurance plan, as those payments are not considered "compensation" for purposes of Section 914(j). *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1137 (1981). Neither is the employer entitled to a credit for payments made by a non-occupational sickness and accident carrier. *Mijangos*, 19 BRBS at 21; *Jacomino v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 680, 684 (1979); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473, 480-481 (1978).

In other words, where the employer continues the claimant's regular salary during the claimant's period of disability, the employer will not receive a credit unless it can show the payments were intended as advance payments of compensation. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 723, 21 BRBS 51, 59 (CRT)(11th Cir. 1988); *Van Dyke v. Newport News Shipbuilding & Dry Dock*

Co., 8 BRBS 388, 396 (1978); *McIntosh v. Parkhill-Goodloe Co.*, 4 BRBS 3, 11 (1976), *aff'd mem.*, 550 F.2d 1283 (5th Cir. 1977), *cert denied*, 434 U.S. 1033 (1978); *Luker v. Ingalls Shipbuilding*, 3 BRBS 321, 326 (1976).

In July 1997, after being placed on no-work status by Dr. Drez, Employer paid Claimant short term disability benefits equal to his full salary for six months. After the six month period, he subsequently received long term disability payments in accordance with Pennzoil's Long Term Disability (LTD) Plan. The LTD benefits constituted 60 % of Claimant's salary.

Marc Maneen, the case management specialist at MetLife, testified that the Long-Term Disability Plan was offered to all eligible employees of Pennzoil. It covered any illness or any disability that arose out of any illness, injury or accident, work-related or otherwise. Under the Pennzoil Plan an employee could not receive both long term disability benefits and worker's compensation. In other words, the LTD benefits and worker's compensation benefits were mutually exclusive. If an employee received LTD benefits and was subsequently awarded worker's compensation benefits for the same period in which he received LTD benefits, the Plan provided for a repayment of monies by the worker for those paid benefits.

William St. Clair was the Director of Benefits for Pennzoil and oversaw the administration of the employee benefit plan. He explained that as long as the employee sustained an injury or illness resulting in total disability, as defined by the Plan, he received LTD benefits. The benefits received by the employee were 60% of his monthly income. The LTD Plan was established to offset any benefits that an employee received through worker's compensation, other disability plans, or Social Security. This disability Plan was 100% funded by Pennzoil, without any employee contribution.

In this instance, I find that Employer is not entitled to a credit for the monies paid to Claimant with regards to the short-term disability payments. Claimant was paid short-term disability for six months, in the amount of his full salary. Despite double recovery on Claimant's part, unlike his subsequent long term disability benefits, there has been no evidence offered that the short-term disability benefits were intended as advance payments "in lieu of compensation" as required under §914(j).

With regards to the long-term disability payments, however, I find, Employer is entitled to a credit for the monies paid. Evidence was offered by Employer, through the testimony of Messrs. Maneen and St. Clair, that the long-term disability payments were considered advanced payments of compensation. Long-term disability benefits differ from short-term disability benefits in that the employee is paid 60 % of his salary as opposed to full salary.

Pennzoil's LTD Plan was intended to provide monies to an employee injured during the course of employment. The LTD benefits and worker's compensation are mutually exclusive. In other words, if an employee receives LTD benefits and subsequently receives worker's compensation benefits, he has to repay the LTD benefits previously received. While the Plan may not use the exact phrase "advance payments of compensation" to describe the LTD benefits, it is evident that the LTD benefits paid to Claimant had that effect. It was understood by Claimant that upon receiving worker's compensation benefits, he had to repay the LTD benefits he had previously received from Employer, thereby not benefitting from double recovery. Employer is entitled to a credit for the LTD benefits paid to Claimant.

Medical benefits

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. *Turner v. Chesapeake & Potomac Tel. Co.,* 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981). *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. *Atlantic Marine v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), *aff'd* 12 BRBS 65 (1980).

Drs. Drez, Leonard, and Gidman all agreed that Claimant's 1997 knee pain and resulting total knee replacement surgery in May 2000, was the natural

progression of Claimant's original 1975 knee injury, while employed by Employer. I find, therefore, that the total knee replacement Claimant underwent was both reasonable and necessary, and as such, I find Employer liable for that expense. Employer is also liable for all other future medical expenses.

ORDER

It is hereby **ORDERED** that:

1. Employer/Carrier[36] shall pay to Claimant temporary total disability compensation from July 8, 1997,[37] and continuing based on an average weekly wage of $1,036.67;[38]

2. Pursuant to Section 7 of the Act, Employer/Carrier are responsible for the expense of Claimant's total knee replacement surgery, as well as any other reasonable and necessary medical expenses Claimant might so incur;

3. Employer shall receive a credit for all compensation benefits (including long term disability payments) and medical benefits previously paid;

4. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

5. Counsel for Claimant, within 20 days of receipt of this ORDER, shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. *See* 20 C.F.R. § 702.132.

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[36]The responsible Carrier is CIGNA inasmuch as it was the carrier on risk in 1997.

[37]Claimant's last day at work was July 7, 1997.

[38]Aggravation constitutes a new injury and the average weekly wage is that earned as of the time of that injury. In this instance it is 1997.

6. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

A
C. RICHARD AVERY
Administrative Law Judge

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